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Stephen A. Saltzburg

George Washington University Law School, ssaltz@law.gwu.edu

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Improper Use of the Trial Judge as Voucher

The Issue

United States v. Harlow, 444 F.3d 1255 (10th Cir. 2006), analyzes whether a prosecutor acts improperly when he uses the trial judge to vouch for the credibility of prosecution witnesses. The court finds that the prosecutor's invitation to the jury to rely on the actions of the judge amounted to improper vouching, although the impropriety was not serious enough to warrant overturning the defendant's conviction.

The Facts

Harlow was the last of several defendants to be tried for participation in a methamphetamine distribution conspiracy in Gillette, Wyoming. The government relied upon six witnesses to prove its case, five of whom were coconspirators who had entered guilty pleas and reached agreements with the government. Three witnesses had already received sentence reductions for their testimony in prior cases. With respect to these three, the prosecutor introduced their plea agreements, which referred to the requirements of cooperation and truthfulness, the government's Rule 35 (b) motions recommending sentence reductions based on their prior testimony, and the orders granting the reductions which were signed by the same trial judge presiding over Harlow's trial. With respect to the other two witnesses who had not yet received sentence reductions, the prosecutor questioned them about the contents of their plea agreements and the possibility of their obtaining sentence reductions.

The Defense Attack

From the opening statements to the closing arguments, the defense attack on the government was consistent. Defense counsel argued that the prosecutor was relying on "snitch testimony, testimony that is essentially . . . purchased by the government in the form of time . . . less prison time." Defense counsel characterized the witnesses' testimony as "unreliable" and suggested that each witness "knows the score," meaning that he "knows what he needs to do here in Wyoming to help himself out." *Id.* at 1259. Each witness, defense counsel argued, knows "he only has to put a slight twist on his testimony to get the benefit here."

This is not the place to evaluate the quality of the defense argument, but it ought to be pointed out that when five witnesses who have pleaded guilty to the criminal conduct also charged against Harlow all testify to Harlow's involvement, it doesn't look like "a slight twist." If their testimony is all false, it looks like a major, concerted effort to frame Harlow; there would be nothing slight about it.

The Prosecutor's Response

Whether or not the jury found the argument to be odd is unknowable, but we do know that the prosecutor chose to respond to the defense attack in the rebuttal closing argument:

You know, the government always - it just doesn't matter. Any case where you call coconspirators to testify against the other coconspirators, we've suddenly hopped in bed with the defendants, the coconspirators, and we've hopped in bed with drug dealers. It's the law, ladies and gentlemen. Congress has a part in that process. [It passes] laws that allow the government to give breaks to cooperating coconspirator drug dealers. Separation of powers. It's all here. Congress allows it to happen. The executive branch, representing the executive, we're involved. We use them as witnesses. **But what's really important, and you can have a chance to take a look at this, you've got the orders reducing their sentences signed by the judicial branch, Judge Johnson.** (*Id.* (emphasis added).)

The trial judge, Judge Alan B. Johnson, instructed the jury that it must examine the testimony of an alleged accomplice or coconspirator “with greater care than the testimony of a witness who did not participate in the commission of a crime,” and it must “determine whether the testimony of an accomplice or coconspirator has been affected by self-interest or by any agreement he may have with the United States.” *Id.* at 1259-60.

Defense Counsel's Complaint

Immediately after the court instructed the jury, defense counsel approached the bench and requested either a mistrial or a curative instruction. He argued that the government's rebuttal argument “suggested that because [the trial court's] signature was on these [sentence reduction orders] that somehow the [trial judge] was vouching for the credibility of these witnesses.” *Id.* at 1260.

The Trial Judge's Curative Instruction

The trial judge denied the request for a mistrial but agreed to give a curative instruction. He instructed the jury as follows:

There was reference made to me having signed an order approving a plea agreement by and between the parties. I'd explain to you that I review plea agreements and decide whether or not they violate any public policy as part of the duties that the judge has in every case. I don't vouch for the credibility of any of the witnesses who have appeared here before this court. That is your job. That is not my job. And I don't make that decision in a case. You're the ones who see the witnesses testify, consider their testimony and, under the instructions of the Court, are the judges of the facts and the weight and credibility

of the witnesses. (*Id.*)

The Trial Result

The jury deliberated for only three hours before it returned a guilty verdict. The trial judge later sentenced Harlow to 120 months imprisonment, and Harlow filed a notice of appeal through new counsel. One of his principal arguments was that the prosecutor had improperly used the reference to the trial judge to vouch for witnesses.

The Argument on Appeal

Harlow's argument on appeal was "that vouching occurred when the jury was given the provisions of the plea agreement in conjunction with the evidence that the prosecutor moved for benefits thereunder and the judge issued his approval." *Id.* at 1262. According to Harlow, "the jury could very reasonably infer that not only had these witnesses promised to tell the truth, but the prosecutor and the judge had verified their testimony via the motion and order – testimony consistent with their testimony at this trial." *Id.* So, Harlow had two separate arguments. The first, that the jury might have inferred that the prosecutor had verified the testimony, is not discussed here. It is the subject of the next article. The focus here is on the prosecutor's reference to Judge Johnson.

The court of appeals agreed with Harlow that the prosecutor made an improper argument:

Aside from his inelegant discussion of our tripartite system of government, the prosecutor stated Judge Johnson had signed off on the testimony of Janway, Flint and Villa. In our view, this violates the prohibition against vouching. While the prosecutor probably meant the jurors should look at the sentence reduction orders as evidence that the judicial branch approves of sentence reductions and co-conspirator testimony in general, his statements to the jury were not so precise. Rather, he directed the jury to look at the sentence reduction orders and attach special importance to them. This is too easily construed as a statement that "the judicial branch, Judge Johnson" had personally approved the credibility of the witnesses' testimony by signing off on their sentence reduction orders. (*Id.* at 1266.)

The court stated that the government tried to defend the rebuttal argument by contending that defense counsel impermissibly attacked the prosecutor's character and veracity, but the court found that this argument did not fit the facts because defense counsel attacked the prosecution's witnesses rather than the prosecutor. Apparently, the court might have been sympathetic to the rebuttal argument if defense counsel had suggested that the prosecutor had somehow acted

to create false testimony. The probable reasoning is that, when a prosecutor is attacked for offering sentence reductions, the fact of judicial approval may be a fair response to the attack.

The court went beyond simply finding improper vouching. It reiterated an admonition to prosecutors that it had previously offered in *United States v. Broomfield*, 201 F.3d 1270 (10th Cir. 2000):

In *Broomfield*, we took the "opportunity to advise prosecutors against what we perceive to be an increasing willingness to unnecessarily push the envelope of improper vouching." 201 F.3d at 1276. We repeat that admonition here. (*Id.*)

The court found that the vouching was not sufficiently prejudicial to require a new trial, since the curative instruction given by the trial judge shortly after the improper argument "sufficiently disabused the jury of any misimpression created by the prosecutor's inartful closing argument." (*Id.*)

The Lesson

Prosecutors have to walk a fine line in dealing with sentence reduction agreements. They offer them on direct examination to bring out the bargain that a witness has received for cooperating with the government, but the fact that Rule 35 (b) sentence reduction agreements are approved by the court is no reason for prosecutors to emphasize that fact. Prosecutors will be well advised to simply point out the extent of the benefit that the witness has received.

Surprisingly prosecutors might also want to ask for the "curative" instruction given by Judge Johnson in this case in all cases. The reason is that in a future case a defendant might argue that jurors, unschooled in the mechanics of Rule 35, might assume that it involves some judicial screening of the truthfulness of prior testimony. This might be especially troubling when the trial judge in one case approved the sentence reductions of the testifying witnesses, as was true in *Harlow*. By asking for an instruction explaining that the judge does not vouch for credibility when approving a sentence reduction, a prosecutor can avoid any claim that the sentence reduction agreements might have been misunderstood by jurors as judicial vouching.

Improper Use of Plea Agreements to Vouch

United States v. Harlow, 444 F.3d 1255 (10th Cir. 2006), was discussed in the last column in connection with the question whether a prosecutor acts improperly when he or she uses the trial judge to vouch for the credibility of prosecution witnesses. This column addresses the impermissible use of plea agreements to vouch for the credibility of a witness.

Brief review of the facts

Harlow was the last of several defendants to be tried for participation in a methamphetamine distribution conspiracy. The government relied upon three witnesses who had already received sentence reductions for their testimony in prior cases. With respect to these three, the prosecutor introduced their plea agreements, which referred to the requirements of cooperation and truthfulness, the government's Rule 35(b) motions recommending sentence reductions based on their prior testimony, and the orders granting the reductions, which were signed by the same trial judge presiding over Harlow's trial. Harlow complained that the prosecutor's use of the plea agreements constituted improper vouching by the prosecution.

Proper use of plea agreements

Apparently, the prosecutor, defense counsel, the trial judge, and the court of appeals agreed on the proper and improper use of plea agreements on direct examination:

It is error for the prosecution to personally vouch for the credibility of a witness. *United States v. Bowie*, 892 F.2d 1494, 1498 (10th Cir. 1990). Nonetheless, as Harlow concedes, it is perfectly permissible for a prosecutor to introduce a witness's plea agreement on

direct examination, even if it includes a truthfulness provision. [*United States v. Magallanez*, 408 F.3d [672] at 680 (10th Cir., cert. denied, 126 S. Ct. 468 (2005)); [*United States v. Lord*, 907 F.2d [1028] at 1031 (10th Cir. 1990); *Bowie*, 892 F.2d at 1498-99. A prosecutor may also discuss the truthfulness provision and make sure the witness is aware of the consequences of failing to tell the truth. *Bowie*, 892 F.2d at 1499. This is intended to allow the prosecutor to head off claims that the witness's testimony is suspect due to the plea agreement. "Use of the 'truthfulness' portions of [plea] agreements becomes impermissible vouching only when the prosecutors explicitly or implicitly indicate that they can monitor and accurately verify the truthfulness of the witness's testimony." *Id.* at 1498. Such independent verification can take the form of statements about polygraph tests or detective monitoring. *Id.*

Relevant portions of the plea agreements

Three sections of the plea agreements were highlighted by the court of appeals:

12(g). The Defendant agrees that if the United States determines, in its sole discretion, that he has not provided full and truthful cooperation . . . the plea agreement may be voided by the United States.

13. The Defendant agrees that he is willing to provide substantial assistance in the investigation or prosecution of other persons who may have committed criminal offenses. The Defendant understands and agrees that a possible appropriate reduction of sentence . . . for such assistance shall be determined by the court. The Defendant agrees a possible sentence reduction can only occur upon the court's evaluation of the significance and usefulness of the Defendant's assistance, taking into consideration the government's evaluation of the assistance rendered, the truthfulness, completeness, and reliability of any information or any testimony provided by the Defendant.



Stephen A. Saltburg is the Wallace and Beverley Woodbury University Professor at George Washington University School of Law in Washington, D.C. He is also the Section's chair-elect and a contributing editor to *Criminal Justice* magazine.

...
16(d). If the United States determines, in its sole discretion, that the Defendant has fully, completely, and truthfully cooperated with the United States, the United States agrees to recommend at the time of sentencing a downward departure . . . to reflect the Defendant's substantial assistance to the United States in this investigation by virtue of the information provided to authorities involved in this matter and due to his ongoing truthful testimony and truthful cooperation with law enforcement authorities.

Analysis of the three sections

The court rejected Harlow's argument that section 12(g) constituted vouching because it permitted the jury to infer that the prosecutor had verified the witness's truthfulness in a prior case. The argument rested on the notion that, had the prosecutor not verified truthfulness, it would have rescinded the plea agreement. The court concluded that "the provision's language contains no explicit or implicit requirement that the prosecutor monitor or verify the truthfulness of the witness's testimony, it merely requires the witness to testify truthfully or else the agreement *may* be rescinded." (444 F.3d at 1263.) The court added that "[o]ne would hope a prosecutor had an expectation of truthfulness from every witness he called," so that "verified truthfulness is not a precondition to the witness testifying, and the government does not assume the burden of monitoring for accuracy." (*Id.*)

The court found sections 13 and 16(d) to be "more problematic." Section 13 was the section that implicated the judge in the verification process, which raised the question of judicial vouching covered in the last column.

As for 16(d), the court reasoned that it "clearly states the government will recommend a downward sentence departure if the witness 'fully, completely, and truthfully' testifies and that the reduction will be 'due to his *ongoing truthful testimony* and truthful cooperation with law enforcement authorities.'" (*Id.*) The court found that this section, together with the government's Rule 35(b) motions implied that the government had verified the truthfulness of, the witness and believes that the witness's ongoing testimony is truthful. The court indicated that it would be less concerned about the language if the government had recommended a sentence reduction for testimony about an unrelated event, but such was not the case here. The three witnesses

testified in a series of trials relating to the same alleged methamphetamine drug conspiracy. The court's bottom line was that "[t]he combination of section 16(d) with the introduction of the government's Rule 35(b) motions amounts to prosecutorial vouching."

Harmless error

The court found that the vouching was harmless error. The three witnesses for whom the prosecution vouched were not the core of the government's case; they merely provided background testimony about the conspiracy. The key testimony was provided by two other coconspirators who had not yet received sentence reductions. The prosecutor questioned them about the contents of their plea agreements and the possibility of their obtaining sentence reductions. But there was no danger of vouching in the way the prosecutor improperly vouched for the other three witnesses, because these two witnesses had not yet received sentence reductions. Thus, no claim could be made that the prosecutor had assessed their testimony about the conspiracy and found it to be truthful.

The lesson

Prosecutors are on notice that the specific language placed in plea agreements may result in a claim by a defendant of improper vouching. The problem of improper vouching by the prosecutor is likely to be greatest when the following factors coalesce in a case:

1. The language of the plea agreement states that the government will recommend a sentencing reduction or concession if it determines that the witness has testified truthfully.
2. The government has moved for a sentence reduction or concession as agreed to in the plea agreement.
3. The prior testimony by the witness on which the sentence reduction or concession rests relates to the same event to which the witness will testify in the case in which improper vouching is alleged.
4. The prosecutor introduces evidence both of the substance of the plea agreement and the motion for a sentence reduction.

The argument that improper vouching occurs becomes stronger if the prosecutor explicitly calls the jury's attention to a section such as 16(d) in the

course of introducing the plea agreement into evidence.

Obviously, prosecutors can avoid many vouching claims by refraining from making Rule 35(b) motions until a cooperating witness has completed his or her testimony in all related cases. But Rule 35(b) limits ordinary government motions to reduce sentences to one year after sentencing. Depending on the speed or lack thereof with which cases are processed, the government may not be able to wait to make the motion if it keeps its promise to cooperating witnesses.

Even if a Rule 35(b) motion has been made, the prosecutor need not elicit that fact in questioning a witness. If the jury does not know that a motion has been made and granted, the concern about vouching is largely diminished.

Warning to the defense

It should be noted that the court does not address whether a defendant has any possible complaint when a prosecutor introduces a plea agreement containing a section such as 16(d) but does not offer evidence regarding the Rule 35(b) motion, and the defendant then questions the witness about the Rule 35(b) motion. Most likely, the defendant who engages in such questioning will not be able to argue improper vouching because the prosecutor has done nothing to indicate to the

jury that the government has acted under section 16(d) or that the trial judge has granted the motion (which implicates section 13 of the plea agreement). Defense counsel may have to choose whether to impeach the witness with the Rule 35(b) questioning and risk having the jury connect section 16(d) with the motion, or forgo the Rule 35(b) impeachment and rely upon section 16(d) itself to show a motive for the witness's testimony. Similarly, defense counsel must decide whether to elicit evidence that a Rule 35(b) motion has been granted, which may focus the jury on section 13, or to be content with relying on section 16(d) to show the power that the prosecution has over a witness.

Warning to the prosecution

If the prosecutor chooses not to offer the Rule 35(b) motion and the defense introduces the motion either by offering the actual document in evidence or by questioning a witness about it, the prosecutor should not explicitly tie section 16(d) to the motion in closing argument. That would surely result in a finding of improper vouching under the analysis of the *Harlow* case. Similarly, if the defense elicits evidence that the Rule 35(b) motion was granted, the prosecutor should not seek to tie that evidence to section 13. To do so is to inject concerns about judicial vouching into a case. ■

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